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SEP 12 1994

No. 94-264

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

VERGNAUD AIMABLE, et al.,

Petitioners,

v.

LONG & SCOTT FARMS, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

CHARLES KELSO
(Counsel of Record)
FISHER & PHILLIPS
1500 Resurgens Plaza
945 East Paces Ferry Road
Atlanta, Georgia 30326-1125
(404) 231-1400
Counsel for Respondent

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33 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

STATEMENT OF THE CASE 2

ARGUMENT 5

I. THE ELEVENTH CIRCUIT APPLIED THE APPROPRIATE FACTORS WHEN MAKING ITS JOINT EMPLOYMENT DETERMINATION IN THIS CASE 5

II. THE ELEVENTH CIRCUIT PROPERLY HELD THAT THE REGULATORY FACTORS OF "CONTROL" AND "SUPERVISION" WEIGH AGAINST A JOINT EMPLOYMENT FINDING. 12

A. Miller's Harvesting Operations 12

B. Nature and Degree of Control of the Workers 15

C. The Degree of Supervision, Direct or Indirect, of the Work 20

III. THE ELEVENTH CIRCUIT GAVE DUE CONSIDERATION TO THE "ECONOMIC REALITY" IN THIS CASE AND DID NOT ADOPT A NEW TEST FOR DETERMINING JOINT EMPLOYMENT. 23

TABLE OF CONTENTS (cont'd.)

A. This Court Should Reject Plaintiffs' Request That the Court Impermissibly Expand the AWPA and the FLSA so as to Make All Farmers Automatically a Joint Employer of the Workers Hired by an Independent Contractor 25

CONCLUSION 28

TABLE OF AUTHORITIES

Cases **Page**

Aimable v. Long & Scott Farms, Inc., 20 F.3d at 443 (11th Cir. 1994) . . . . . *passim*

Beliz v. W. H. McCleod & Sons Packing Co., 765 F.2d 1317 (5th Cir. 1985) 9, 10

Bonnette v. California Health and Welfare Agency, 704 F.2d 1465 (9th Cir. 1983) 6, 9

Castillo v. Givens, 704 F.2d 181 (5th Cir. 1983) 10

Charles v. Burton, 1994 U.S. Dist. LEXIS 10017 (M.D. Ga., July 1, 1994.) 26

Dole v. Continental Cuisine, Inc., 751 F.Supp. 799 (E.D. Ark. 1990) 6

Donovan v. Brandel, 736 F.2d 114 (6th Cir. 1984) 8

Donovan v. Gillmor, 535 F.Supp. 154 (N.D. Ohio 1982) 8

Fahs v. Tree-Gold Co-Op Growers of Florida, 166 F.2d 40 (5th Cir. 1948) 9

Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320 (9th Cir. 1991) 4, 6, 9

TABLE OF AUTHORITIES (cont'd.)

Hodson v. Griffin & Brand of McAllen, Inc., 471 F.2d 325 (5th Cir. 1973) 24

Patel v. Wargo, 803 F.2d 632 (11th Cir. 1986) 24

Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748 (9th Cir. 1979) 8, 9

Riojas v. Seal Produce, Inc., 82 F.R.D. 613 (S.D. Tex. 1979) 6

Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) 24

Secretary of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987) 8

United States v. Silk, 331 U.S. 704 (1947) 8

Statutes and Regulations **Page**

29 C.F.R. § 500.20(h)(4) 2

29 C.F.R. § 500.20(h)(4)(ii)A-E 5

29 C.F.R. § 780.331 27

29 U.S.C. § 201 2

29 U.S.C. § 1801 2

29 U.S.C. § 1802(5) 2

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BRIEF IN OPPOSITION

Respondent Long & Scott Farms, Inc. ("Long & Scott")[1] respectfully requests that this Court deny the Petition for a Writ of Certiorari, seeking review of the judgment of the United States Court of Appeals for the Eleventh Circuit.

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[1] Respondent Long & Scott Farms, Inc. has no corporate parents or subsidiaries.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 20 F.3d 434 (11th Cir. 1994). The opinion of the United States District Court for the Middle District of Florida is unreported. Both of these opinions are reproduced as an Appendix in the Petition.

STATEMENT OF THE CASE

To prevail below, Petitioners/Plaintiffs ("Plaintiffs") were required to establish that Long & Scott was their "employer" within the meaning of the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. § 1801, et seq. and within the meaning of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq. All parties agree that the Plaintiffs were employees of Defendant John Miller, Jr. ("Miller") and that Miller was an independent contractor and not a mere employee/foreman vis-a-vis Long & Scott. The legal issue presented to the Eleventh Circuit was, therefore, whether Long & Scott also employed the Plaintiffs, i.e. -- whether Long & Scott and Miller were "joint employers."

AWPA specifically adopts the FLSA term "employ" by incorporating reference, 29 U.S.C. § 1802(5) and the regulations promulgated by the United States Department of Labor under AWPA define the term "employ" to include the "joint employment" principles applicable under the FLSA. Title 29 C.F.R. § 500.20(h)(4) provides that "'joint employment' under the [FLSA] is 'joint employment' under

the AWPA." Because of AWPA's adoption of the FLSA definition of "employ" and its tests of joint employment, this Court will recognize that: (1) these tests are not new -- they are the same tests that have been applied by courts for more than 50 years and (2) these tests are not unique to agricultural cases -- they are the same tests that apply to all industries covered by the FLSA, such as construction, manufacturing, etc.

The parties in the district court below agreed that the factual record on the joint employment issue was undisputed and cross motions for summary judgment were filed on this issue. The Eleventh Circuit analyzed the "economic reality" of all of the facts and circumstances presented by this undisputed factual record and upheld the district court's conclusion that Long & Scott was not an "employer" or a "joint employer" of the Plaintiffs within the meaning of AWPA or FLSA.

The Eleventh Circuit properly analyzed the regulatory and non-regulatory factors used to determine joint employment under AWPA and the FLSA, and applied traditional, well established legal tests which have been developed over the years in this area of the law. In fact, the Eleventh Circuit's opinion is unique only in that it makes a careful, separate analysis of each of the various factors and decides what weight, if any, should be given those factors as appropriate in this particular case, instead of merely string citing all factors that might support the its ultimate legal conclusion.

There are no "special or important" reasons to grant Plaintiffs' Petition as contemplated by Rule 10.1. The Eleventh Circuit's decision

is not in conflict with any decision of this Court or any other Court of Appeals. Nor has the Eleventh Circuit "so far departed from the accepted and usual course of judicial proceedings... as to call for an exercise of this Court's power of supervision." See Rule 10.1.a In fact, just the opposite is true. The Eleventh Circuit decision carefully applies the traditional factor-based analysis of joint employment and is consistent with the decisions of other courts which have been called upon to render joint employment determinations. See, e.g., Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1324 (9th Cir. 1991).

Long & Scott files this Brief in Opposition primarily because of its obligation under Rule 15.1 to "address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issue would properly be before the Court if certiorari were granted." Three (3) such misstatements will be addressed by this Brief. First, the Plaintiffs argue that the Eleventh Circuit erred by concluding that four (4) non-regulatory factors are irrelevant to test the joint employment issue presented in this case. These four (4) non-regulatory factors advanced by the Plaintiffs do appear in some of the cases dealing with various employment issues developed under AWPA and the FLSA. These factors are, however, irrelevant to test the joint employment issue presented in this case. Second, the Plaintiffs erroneously argue that the Eleventh Circuit failed to give due consideration to the "economic realities" of the alleged joint employment relationship in the case and that it adopted a new test for determining joint employment. Third, the Plaintiffs have distorted the factual record to argue that the Eleventh Circuit misapplied the

regulatory factors of "control" and "supervision" which everyone agrees are relevant factors to analyze joint employment.

ARGUMENT

I. THE ELEVENTH CIRCUIT APPLIED THE APPROPRIATE FACTORS WHEN MAKING ITS JOINT EMPLOYMENT DETERMINATION IN THIS CASE

Plaintiffs concede that the five (5) "regulatory factors" analyzed by the Eleventh Circuit are relevant to the joint employment issue presented in this case. These five (5) factors are: (1) the nature and degree of control of the workers, (2) the degree of supervision, direct or indirect, of the workers, (3) the power to determine the pay rates or the methods of payment of the workers, (4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers, and (5) the preparation of payroll and the payment of wages. 29 C.F.R. § 500.20(h)(4)(ii)A-E.

The Ninth Circuit Court of Appeals applies the following test in analyzing the joint employment issue under the FLSA:

> This circuit...has applied an 'economic reality' test which identifies four factors: whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.

Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1324 (9th Cir. 1991), citing Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983). (Emphasis added.) The Ninth Circuit's "economic reality" test of joint employment under the FLSA is therefore identical to the five-factor joint employment test set forth in the AWPA regulations. See also, Riojas v. Seal Produce, Inc., 82 F.R.D. 613, 618-19 (S.D. Tex. 1979) (In making a joint employment determination, the court looks to "day-to-day participation, control, involvement or supervision exercised by the alleged employer. [Citation omitted.] Also important in this determination is the extent of involvement of the alleged employer and his right in hiring, firing and setting of wages of the worker."); Dole v. Continental Cuisine, Inc., 751 F.Supp. 799, 802-03 (E.D. Ark. 1990).

The Eleventh Circuit in this case recognized that these five (5) regulatory factors are the keys to unlocking the joint employment issue in this case. These five (5) factors are of paramount importance in determining any alleged joint employment relationship under AWPA and the FLSA. If a farm, or any other company in any industry, does not supervise the workers, control the workers, hire or fire the workers, pay the workers, determine their pay or prepare payroll records, they are very probably not a joint employer of the workers. Both the Eleventh Circuit and the district court below held that all five (5) of these regulatory factors weigh heavily against a joint employer finding in this case. Other than their distorted factual characterizations of the "control" and "supervision" factors discussed below, Plaintiffs do not even argue that the Eleventh Circuit erred in concluding that these five (5) crucial factors weight against a joint employer finding.

The Eleventh Circuit also analyzed the six (6) "non-regulatory factors" advanced by the Plaintiffs in this case in making its joint employment determination. The Eleventh Circuit carefully examined each non-regulatory factor independently to determine "whether the factor is relevant to this case; and, if so, whether it supports a finding of joint employment." Aimable, 20 F.3d at 443. Four (4) of the non-regulatory factors -- (1) investment in equipment and facilities, (2) opportunity for profit and loss, (3) permanency and exclusivity of employment, and (4) the degree of skill required to perform the job -- were correctly found by the Eleventh Circuit to be irrelevant based on the facts and circumstances presented in this case.

Plaintiffs' argument that these four (4) factors are relevant is wrong. These factors are found in some of the cases dealing with various employment issues developed under the AWPA and the FLSA. They are, however, properly used only to analyze relationships which are not at issue in this case. These four (4) factors are properly used to determine (1) whether a crewleader is an independent contractor or a mere employee vis-a-vis a farmer or (2) whether individual workers are themselves independent contractors or employees. For the reasons explained by the Eleventh Circuit, these four (4) factors are irrelevant to determine whether Long & Scott is a joint employer, along with Miller, of the individual workers in this case.

Miller meets all four (4) of these tests -- he has substantial investment in his harvesting business, he bears a substantial risk of profit or loss, he solicits and performs harvesting work for multiple customers simultaneously, and he exercises considerable skill in

managing his million dollar a year business. Accordingly, all parties agree that Miller is an independent contractor vis-a-vis Long & Scott. Likewise, the Plaintiffs meet none of these tests, and all parties agree that they are employees and they are not independent contractors. Thus, these four (4) tests tend to establish what is already agreed -- Miller is an independent contractor and the Plaintiffs are employees. These factors say nothing about whether Long & Scott has done something to make it legally responsible for Miller's employees as a joint employer.

The cases relied upon and cited by the Plaintiffs which deal with the issue of whether individual workers are themselves employees or independent contractors are irrelevant. Again, no one contends that the Plaintiffs here are independent contractors; everyone agrees that they are employees. Typical of these cases is Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748 (9th Cir. 1979).[2] There, strawberry pickers brought suit under the FLSA claiming to be

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[2] Other inapposite cases cited by the Plaintiffs in their Petition where the issue is whether individual workers are themselves employees or independent contractors vis-a-vis a farmer (or company) alleged to be their employer include United States v. Silk, 331 U.S. 704 (1947) (individual coal workers are employees, not independent contractors; truck owners/drivers are independent contractors and not employees); Secretary of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987) (individual cucumber pickers are employees and not independent contractors); Donovan v. Brandel, 736 F.2d 114 (6th Cir. 1984) (individual cucumber pickers are independent contractors and not employees); Donovan v. Gillmor, 535 F.Supp. 154 (N.D. Ohio 1982) (individual cucumber pickers are employees and not independent contractors).

employees of Driscoll Farms. Driscoll Farms contended that the workers were themselves independent contractors, not its employees. No crewleader was involved at all.

The Ninth Circuit in Real cited a factor test which includes the four (4) non-regulatory factors determined to be irrelevant by the Eleventh Circuit. According to the Real court, these are factors "which may be useful in distinguishing employees from independent contractors" under the FLSA. Id. at 754. Thus, the Ninth Circuit in Real analyzed a relationship which is not at issue here, and Plaintiffs reliance on this case is misplaced. As noted above, the Ninth Circuit applies a different factor test which is consistent with the Eleventh Circuit's decision in Aimable when making a true joint employer determination under the FLSA. See Gilbreath and Bonnette, supra. Comparing the different tests applied by the Ninth Circuit to these very different employment issues supports the Eleventh Circuit's decision that these four (4) factors advanced by the Plaintiffs are irrelevant in this case and that the Eleventh Circuit's decision is consistent with the Courts who have addressed this issue.

Likewise, the cases cited by the Plaintiffs which deal with the issue of whether a crewleader is an independent contractor or a mere employee vis-a-vis a farmer are likewise irrelevant. No one contends that Miller is a mere employee/foreman of Long & Scott; everyone agrees that he is an independent contractor and an employer of the Plaintiffs. Examples of these inapposite cases include Fahs v. Tree-Gold Co-Op Growers of Florida, 166 F.2d 40 (5th Cir. 1948); Beliz v.

W. H. McCleod & Sons Packing Co., 765 F.2d 1317 (5th Cir. 1985); Castillo v. Givens, 704 F.2d 181 (5th Cir. 1983).

In Beliz, the Fifth Circuit held that a crewleader (Galen) was a mere employee of the farmer (McCleod) and, therefore, the farmer was the sole employer of the workers. Beliz, 675 F.2d at 1328. The farmer in Beliz, unlike Long & Scott here, (1) stayed in the fields to supervise the harvest work, (2) possessed the authority to fire individual workers, (3) established the workers' piece rates, (4) prepared payroll documents, (5) maintained workers' compensation on the workers, and (6) paid the crewleader only a small piece-rate override. Id. at 1322 and 1328. In Castillo, crewleader Tonche, whom the farmer claimed to be the sole employer of the workers, himself chopped cotton in addition to supervising other workers. Castillo, 704 F.2d 191. In concluding that Tonche was himself a mere employee of the farmer, the court considered of "particular importance" the fact that the farmer "did not pay Tonche enough for Tonche himself to pay the workers minimum wage." Id. at 192. Thus, not only was the legal issue presented to the courts in Beliz and Castillo different from the joint employer issue presented here, the cases are factually distinguishable on numerous grounds as well. Miller was admittedly an independent contractor, and the undisputed facts establish that he ran a large business enterprise. (See Section II, A below.) He was not a mere foreman/employee as was the crewleader in these cases.

This is not the first time in this case that Long & Scott and the Plaintiffs have debated the relevancy of these four (4) non-regulatory factors. Long & Scott's summary judgment brief to the district court

argued that these four (4) non-regulatory factors were irrelevant. In Plaintiffs' response to Long & Scott's brief on this issue, Plaintiffs acknowledged an "analytical error" that they had made in their principal brief.

> It was thus somewhat confusing and erroneous for Plaintiffs to directly apply factors enunciated by the courts in determining the relationship between a farm labor contractor and a farmer in analyzing the relationship between individual workers (the Plaintiffs) and a farmer (Long & Scott). Plaintiffs apologize for this error.

(See Plaintiffs' Response Brief, pp. 26-27.) (Emphasis added.) In their Petition, Plaintiffs have reverted to relying on these admittedly "confusing and erroneous" cases and factors which test employment relationships which are not at issue in this case.

The Eleventh Circuit properly analyzed the probative factors relevant to the legal issue of joint employment presented in this case. As the Eleventh Circuit noted in its decision "it is telling that no other court has adopted each of appellants' proposed factors in one case. The reason: not all factors are relevant in every case." Aimable, 20 F.3d at 444.

II. THE ELEVENTH CIRCUIT PROPERLY HELD THAT THE REGULATORY FACTORS OF "CONTROL" AND "SUPERVISION" WEIGH AGAINST A JOINT EMPLOYMENT FINDING

A. Miller's Harvesting Operations

The Petition attempts to paint a picture of Miller (and, therefore, his workers) as being completely dependent on Long & Scott for his livelihood and but a mere conduit of Long & Scott's ultimate control and supervision of Miller's workers. Plaintiffs claim that Long & Scott has interposed Miller as a "fly-by-night operator" to shield itself from liability. Plaintiffs' characterization of Miller is simply not supported by the record. In order to place Plaintiffs' factual arguments on the "control" and "supervision" factors in their proper perspective, a review of Miller's harvesting operations during the relevant time frame of this case is necessary.

Miller was engaged in the business of contract harvesting of fruit and vegetables in Florida, North Carolina, South Carolina, Georgia, Kentucky and Alabama. (Miller Aff., ¶ 2; Miller, pp. 17-25)[3]

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[3] The factual record relevant to this Petition consists primarily of the affidavit and deposition testimony of Frank D. Scott, Jr. and Defendant John Miller, Jr. The district court docket sheet indicates that the affidavits of Messrs. Scott and Miller, filed in connection with Long & Scott's motion for summary judgment, are included in the record in "separate file" number two. Mr. Scott's affidavit will be cited as "Scott Aff., ¶ ___," and Mr. Miller'saffidavit will be cited as "Miller Aff., ¶___," throughout this brief. The docket sheet also indicates that the deposition transcripts of Messrs. Scott and Miller, filed in connection with the Plaintiffs' motion for summary judgment, are included in the record in "separate file" number one. Mr. Scott's

His business revenues were approximately one million dollars ($1,000,000.00) per year. (Miller Aff., ¶¶ 2, 43; Miller, pp. 181-85, 253) Between 1985 and 1989, Long & Scott contracted with Miller to pick, grade and pack its cucumber, corn and cabbage crops and to grade and pack its potato crop. (Miller Aff., ¶ 3; Miller, p. 68; Scott Aff., ¶ 4)[4]

Miller and Frank Scott met before each crop harvest to negotiate a price that Long & Scott agreed to pay Miller for his harvesting services. (Miller, pp. 104-106, 266-67; Scott Aff., ¶ 6; Scott, p. 62) These arms-length negotiations resulted in total payments from Long & Scott to Miller of approximately four hundred twenty thousand dollars ($420,000.00) to seven hundred fifty thousand dollars ($750,000.00) each year between 1985-1989. (Miller, p. 185; Scott, pp. 162-63; Scott Aff., ¶ 21) These payments from Long & Scott, however, represented only about one-half of Miller's total revenues from his operations during these years; the balance was from harvesting citrus and vegetables for other farmers. (Miller, p. 253; Miller Aff., ¶ 43; Scott Aff., ¶ 22) Out of his revenues, Miller covered not only wage payments to his workers but the indirect, overhead costs of obtaining and maintaining his crew (recruitment, labor camp costs, transportation), supervision, equipment purchase and upkeep, taxes,

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deposition transcript will be cited as "Scott, p. ___," and Mr. Miller's deposition transcript will be cited as "Miller, p. ___," throughout this brief.

[4] The statement contained in the Petition that Long & Scott "hired" Miller to "recruit and furnish migrant farm workers" is simply not correct. (Petition, p. 5)

lawyers, accountants, insurance, etc. Miller's wage payments to his workers represented only one-half of his total revenues. (Miller Aff., ¶¶ 2, 43; Miller, pp. 181-85, 253) He had, therefore, approximately one-half million dollars ($500,000.00) per year to cover his overhead costs and profit. How Miller controlled these overhead costs determined whether Miller posted a profit or loss.

It is undisputed that Miller was solely responsible for the recruitment, transportation and housing of his crews and the expenses associated with these activities. (Petition, p. 5.) While Long & Scott was Miller's single largest customer, Miller contracted with many other farmers to harvest their crops. (Miller Aff., ¶¶ 43-45; Miller, pp. 7-30, 253, 282-86) Miller contracted with Bowen Brothers to pick citrus throughout Florida. (Id.)[5]

Miller had his harvesting operation set up so that he was not required to supervise field workers personally. (Miller, pp. 271-73; Scott Aff., ¶ 23) He employed field supervisors to monitor all of his crews. (Id.) When Miller had contracts with different farmers which ran at the same time, he employed different supervisors for the different locations. (Id.) Miller's employment of supervisors freed him to manage his operations -- seeking harvesting contracts, overseeing his

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[5] Miller's citrus harvesting operations started the first of December and lasted until mid-April. (Id.) This is the same time period when Miller harvested cabbage for Long & Scott. (Id.) Miller employed 75 workers harvesting citrus and approximately 24 workers harvesting cabbage. (Id.; Miller, pp. 231-32, 270-72) Miller decided which of his workers harvested citrus and which harvested cabbage. (Miller, p. 271)

labor camp and garage operation, meeting with his professional advisors, etc. Miller had a substantial investment in his harvesting operations, as well as large overhead maintenance costs.[6] Miller was not a mere Long & Scott foreman who was hired only to "hire and [personally] supervise migrant workers." (Petition, p. 26.)

B. Nature and Degree of Control of the Workers

The Eleventh Circuit held that this regulatory factor weighed against a joint employer finding. This conclusion is amply supported by the record. Miller alone decided the manner by which he fulfilled his harvesting contracts with Long & Scott. From Long & Scott's

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[6] In addition to the costs of recruiting and housing his work force, Miller owned and operated two 40-passenger buses, two 18-passenger vans, 3 pickup trucks used by Miller and his supervisors, 2 citrus "goats" (lift trucks used to move fruit in the orchards), 6 to 8 24-foot bed hauling trucks, 2 wagons to carry tubs and ladders, 150 to 200 cucumber bins, 75 citrus tubs, 75 ladders, 50 cabbage knives, 6 rickrack tools, 4 field toilets, a water tank, 6 igloos for drinking and hand washing, and 2 computers for payroll and bookkeeping. (Miller Aff., ¶ 46; Miller, pp. 253-59) Miller purchased his own mule train in March, 1989, for $12,000.00. (Miller, pp. 19-20) Miller operated a vehicle repair garage in Tangerine, Florida and employed a full time mechanic to keep his equipment operating. (Miller Aff., ¶ 46) Miller estimated that his vehicles and equipment represented an investment of approximately$130,000.00. (Miller Aff., ¶ 47) He also paid some of his workers daily and may have had $12,000 to $13,000 in wages outstanding before he was paid by Long & Scott. (Miller, pp. 267-68) Miller employed a number of professional advisors -- CPA's, attorneys, and labor advisors -- to assist him in his various operations. (Miller Aff., ¶¶ 49-53; Miller, pp. 283-85)

perspective, Miller certainly controlled his crew. Miller alone decided (1) whether he used his crew exclusively or whether he subcontracted work to local crewleaders; (2) the point at which it was no longer profitable for him to continue to harvest the cucumber or cabbage fields; (3) which members of his crew performed hourly-paid grading work and which performed piece-rate harvesting; (4) when his crews started and stopped work; (5) how many workers to have in the field; (6) which workers performed different harvesting tasks -- e.g. pulled or packed corn, cut cabbage or closed boxes, picked cucumbers or drove the trucks; (7) who to hire, fire and discipline; and (8) which of his crew worked under the different harvesting contracts Miller had with different farmers, etc. (See Miller Aff., ¶¶ 11, 13-17, 27-31, 34; Miller, pp. 201, 267-86; Scott Aff., ¶¶ 6, 11, 15, 18; Scott, pp. 14-15, 56-57, 64.)[7]

Looking at who controlled the Plaintiffs from the Plaintiffs perspective, it was certainly Miller. He had total control of their work in the field. He recruited, housed, transported, paid and fed them. (Miller Aff., ¶¶ 31-36.) He provided them citrus work during the winter and out-of-state harvest work in the summer. (Miller Aff., ¶¶ 43-45.) How much they earned depended on how much harvesting work Miller could contract.

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[7] For example, Miller decided which workers picked citrus for Bowen Brothers and which workers harvested the cabbage for Long & Scott when those seasons overlapped. (Miller, pp. 269-73)

Plaintiffs assert, however, that Long & Scott "controlled" the Plaintiffs. To support their control argument, Plaintiffs distort the record and mischaracterize certain facts in terms of control. For example, Plaintiffs urge that "the amount of work available to Petitioners was controlled by Long & Scott. Long & Scott unilaterally decided what crops to plant, when to plant, and which plots to plant first.... Long & Scott checked on the crops on a regular basis and in consultation with Miller decided when to harvest and what specific blocks to harvest each day." (Petition, p. 6.)

The Eleventh Circuit correctly concluded that "Plaintiffs argument misses the point." Aimable, 20 F.3d at 440. Of course, Long & Scott decided what crops to plant and when to plant them. Long & Scott is in the farming business; it makes all decisions regarding planting, as well as cultivation, tillage, irrigation, marketing, etc. of the crops. (Miller Aff., ¶ 30) It bears the weather risks and markets risks of the crops. Miller, on the other hand, is in the harvesting business. He makes all the decisions regarding his business. He bears the risks associated with recruiting, transporting, housing, and otherwise maintaining his large work force and effectively managing the harvest and supervising his crews in the fields. Miller's lack of involvement in farming decisions unrelated to his harvesting contracts is irrelevant to the joint employer issue. The Eleventh Circuit correctly decided that Long & Scott agricultural decisions -- decisions which only indirectly effected the number of workers necessary to harvest the land -- fell far short of the requisite "control" to establish that Long & Scott was a joint employer. Amiable, 20 F.3d at 440-41.

The work available to the Plaintiffs was "controlled" by what harvesting contracts their employer, Miller, undertook for them to perform -- from Long & Scott and from other customers. If Miller contracted with another farmer to pick citrus, which he did, that would also determine the amount of work available to the Plaintiffs. The "economic reality" in this case is that Miller alone had absolute, unfettered control over Plaintiffs and their employment.

The contractual arrangement between Long & Scott and Miller was no different from the contractual arrangement between a housing developer/general contractor and the numerous subcontractors who do framing, plumbing, roofing, painting, etc. necessary to build houses. The painting contractor, for example, certainly does not determine what houses to build, when to build them or what color to paint them. The painting contractor and the developer do coordinate to determinate when various units will be ready to paint, the painting priority based on timing of sales, colors desired by customers, etc. The developer would also inspect the houses to determine compliance with contract specifications before accepting them as complete. Such coordination and inspection is not "control" so as to make the developer the joint employer of the painting contractor's employees.

The Plaintiffs further mischaracterized the record in an attempt to establish "control" by Long & Scott by claiming that Frank "Scott supervised the grading of vegetables to make sure the job was done right, Scott notified Miller if a worker was not doing a good job or if

too many undersized cucumbers were being picked..." (Petition, p. 6)

Frank Scott did inspect the overall grading operation at Long & Scott's packing house to make sure that the crates were properly packed and graded. (Scott, p. 79) He did not, however, supervise or control the individual workers; Miller employed a supervisor to supervise the grading house workers. (Id.; Miller Aff., ¶ 27) The factual record cited by the Plaintiffs on this point states:

[By counsel for Plaintiffs]

> Q. You would then go to the supervisor person [in the packing house] and express your concerns that the particular individual is no doing the job right?

[By Scott]

> A. The result wasn't right -- not the particular individual, but the result wasn't right. They [Miller's supervisors] would have to pick the individual out.

(Scott, p. 80) (Emphasis added.)

This record citation relied on by the Plaintiffs further shows that Long & Scott contracted for an agreed upon result and that Miller was responsible for how the result was accomplished. If Miller's employees did not achieve contract specifications, it was entirely proper to demand from Miller's supervisor proper contract performance. And, as discussed below, not one single Plaintiff in this case has stated that he was ever supervised in the packing house or anywhere else by Scott.

C. The Degree of Supervision, Direct or Indirect, of the Work

The Eleventh Circuit also held that this regulatory factor weighed against a joint employer finding. This conclusion is also amply supported by the record. Miller employed three (3) field supervisors and a packing house supervisor who supervised and controlled the workers in his crew. (Miller Aff., ¶ 27) Miller decided how many supervisors to place in the fields; Miller alone hired and controlled his supervisors and determined the methods and amount of their pay. (Miller Aff., ¶¶ 27, 29, 30; Miller, pp. 270-73, 279-81; Scott Aff., ¶ 23)

Miller and his supervisory staff supervised Miller's crews in the fields. (Id.) As Miller testified:

[By counsel for Long & Scott]

Q. Do you decide which of your workers to fire?

[By Miller]

A. Yes.

Q. And anybody that you are going to apply any discipline to, that's up to you or your supervisors in the field?

A. Right.

Q. Does Long & Scott ever tell you that you've got to fire or discipline a worker?

A. Nope.

(Miller, pp. 280-81) (See also Miller Aff., ¶ 27; Scott Aff., ¶ 23)

A Long & Scott employee was rarely even in the fields, except for Petty, Long & Scott's mechanic, who drove the corn harvester pursuant to Miller's directions. (Scott Aff., ¶ 24; Miller Aff., ¶ 31; Miller, pp. 269-70) Petty did not supervise employees, he "just dr[o]ve the machine." (Miller, p. 270) Scott or his field employees did occasionally speak to Miller or his supervisors in the field to relay any messages from the packing house, such as information about produce orders or rejection of produce by the federal inspectors. (Scott Aff., ¶ 24; Miller Aff., ¶ 31; Miller, p. 236, Scott, pp. 132-33) These Long & Scott employees did not supervise any of the workers, however. (Id.)

The Plaintiffs themselves have identified Miller and his staff as their sole supervisors in the field. During discovery, Long & Scott served an interrogatory on all 206 then named Plaintiffs requesting that they "identify all individuals who supervised your work while you allegedly worked at Long & Scott Farms." (See generally responses filed by individual Plaintiffs contained in "separate file" No. 1) Not a single Plaintiff identified Frank Scott or any other Long & Scott employee as their supervisor. Rather, all 206 Plaintiffs responded that Miller or members of his supervisory staff supervised their work.

Notwithstanding these undisputed facts which establish that Miller and his staff alone supervised his crews, the Plaintiffs claim that "Long & Scott also exercised some direct supervision over Petitioners." (Petition, p. 7) To support this conclusion, they cite one Plaintiff's interrogatory answer which states that there was "a man from the company who came out to the fields every day and told us what to do, including what to cut and how to pack. He spoke to me personally on

several occasions." (Petition, p. 7) Petitioners claim that "more than thirty other Petitioners submitted similar statements." (Id.)

The Plaintiffs' again mischaracterize the record on this point. As noted above, all 206 Petitioners (100%) responded that Miller or members of his supervisory staff supervised them in the fields. None of the 30 interrogatory responses (15%) relied on by the Plaintiffs identifies a Long & Scott employee by name or description -- they all claim that a "white man" or an anonymous "man from the company" came out to the fields. The majority of even these few responses simply claim that the anonymous "man from the company" checked boxes, looked around, or spoke to Miller or his supervisory staff. (See "separate file" No. 1) Even if a Long & Scott employee checked boxes, spoke with Miller and looked around, it is not inconsistent with the Eleventh Circuit's holding that Long & Scott did not supervise Miller's crews. There are a number of reasons a "man from the company" may need to be in the field or communicate with Miller which have nothing whatsoever to do with field supervision. (See Scott Aff., ¶ 24; Scott, p. 132; Miller Aff., ¶ 31, Miller, p. 236)

Only eleven of the 206 responses (5%) claim that the anonymous "man from the company" told the Plaintiffs to do anything. This is remarkable in view of the fact that Plaintiffs' counsel knew of this important factor and presumably made every effort to probe for any such contact in preparing these discovery responses. In any event, all of the Plaintiffs admit that Miller and his staff supervised their work.

The Eleventh Circuit reviewed this "evidence" in "the light most favorable to appellants" and correctly concluded that any direct or indirect supervision by Long & Scott was de minimis. Aimable, 20 F.3d at 441. In fact, the Eleventh Circuit concluded that these alleged examples of "infrequent oversight" were "notable because they indicate that Long & Scott, except on rare occasions, left supervision and oversight of appellants entirely to Miller and his crew." Id.

Contrary to Plaintiffs' assertion, the Eleventh Circuit did not hold "that indirect control and supervision are irrelevant in a joint employment context." (Petition, p. 16.) Rather, the Eleventh Circuit analyzed all of the record facts on these issues in the light most favorable to the Plaintiffs and simply found that both the "control" and "supervision" factors weighed against a joint employment finding. Likewise, the court did not, as Plaintiffs assert, "insist on direct control and continuous supervision." (Petition, p. 20.) Instead, it found that any direct or indirect control or supervision present in this case was de minimis. The Eleventh Circuit's factual findings on these issues raise no issue which warrants review by this Court.

III. THE ELEVENTH CIRCUIT GAVE DUE CONSIDERATION TO THE "ECONOMIC REALITY" IN THIS CASE AND DID NOT ADOPT A NEW TEST FOR DETERMINING JOINT EMPLOYMENT

Contrary to the main thesis of the Petition, the Eleventh Circuit did not adopt a "fundamentally different test [for determining employer status] in joint-employer versus single employer situations." (Petition, p. 12.) Instead, it expressly acknowledged and applied precisely the

same test that the Plaintiffs advocate - i.e., "economic reality." (Compare Petition, p. 12 with Aimable, 20 F.3d at 439.)

The Eleventh Circuit thus applied the test that has been used by this Court and other courts, and that looks at the economic reality of all of the facts and circumstances. As the Eleventh Circuit stated:

> To determine whether an employer/employee relationship exists, for purposes of federal welfare legislation, we look not to the common law definitions of those terms (for instance, to tests measuring the amount of control an ostensible employer exercised over a putative employee), but rather to the "economic reality" of all the circumstances concerning whether the putative employee is economically dependent upon the alleged employer. See e.g., Rutherford Food Corp. v. McComb, 331 U.S. 722, 730, 67 S.Ct. 1473, 1477, 91 L.Ed. 1772 (1947) (construing distinction between employee and independent contractor status under FLSA); Patel v. Wargo, 803 F.2d 632, 635 (11th Cir. 1986) (analyzing joint employment under FLSA); Hodson v. Griffin & Brand of McAllen, Inc., 471 F.2d 325, 237-38 (5th Cir. 1973) (same).

Id. As noted above, the Eleventh Circuit applied the five (5) factors that are specifically set out in the AWPA regulations for determining whether a joint employment relationship exists.

Moreover, the Eleventh Circuit held that the proper analysis is not limited to these five (5) factors, and that the Court should consider the non-regulatory factors advanced by the Plaintiffs. As the Eleventh Circuit stated:

> The fact that the regulation makes reference to cases that considered factors in addition to the five regulatory factors reinforces our view that additional factors may be considered. Thus, we cannot accept Long & Scott's assertion that we should resolve the joint employment issue solely on the basis of the five regulatory factors.

Id. at p. 440.

Thus, Plaintiffs' argument that the Eleventh Circuit's decision deviates from the decisions of this Court and other courts of appeal is inaccurate. Its decision simply was more comprehensive in its consideration of all factors and in determining which factors in fact were applicable to the case at hand. Plaintiffs disagreement with the Eleventh Circuit's reasoned analysis of which factors were relevant and the relative weight to be accorded each factor based on the undisputed record in this case is no reason to grant their Petition.

A. This Court Should Reject Plaintiffs' Request That the Court Impermissibly Expand the AWPA and the FLSA so as to Make All Farmers Automatically a Joint Employer of the Workers Hired by an Independent Contractor

Plaintiffs' Petition in this case is nothing more than a request that this Court impermissibly expand the reach of the AWPA and the FLSA under the label of "economic reality" so as to automatically make all farmers a joint employer of the workers hired by an independent contractor. The district court below properly rejected Plaintiffs overreaching interpretation of the "economic reality" concept.

> The Plaintiffs also argue that the ultimate test regarding the existence of a joint employer relationship is one of "economic reality" and the degree of "dependency" of the workers upon the farmer. But the workers are always dependent on the

> farmer in an economic sense, and if the workers here were Long & Scott's employees, then it is fair to say that all farm laborers recruited by farm labor contractors would be employees of the farmers on whose farm they work. If Congress had intended that result in enacting the new statute [AWPA] in 1982, it could have said so; but it did not, opting instead to borrow the more limited reach of the joint employer jurisprudence under the FLSA.

Petition Appendix, p. 24a.

Plaintiffs' counsel here made this same argument in another case which was again rejected by a different district court.

> If the court were to accept plaintiffs' argument, however, every farmer who hired a farm labor contractor would become for the purposes of the AWPA and the FLSA a joint employer of the contractor's employees. An "economic reality" test that sweeps as broad as plaintiffs suggest is no test at all; it is a mere formality. The legislative history of the AWPA recognizes that there will be situations in which a farmer is not held to be a joint employer of a farm labor contractor's employees. See H.R. Rep. No. 97-885 at 7.

Charles v. Burton, 1994 U.S. Dist. LEXIS 10017, at 23 (M.D. Ga., July 1, 1994.) (Emphasis added.)

Indeed, the Plaintiffs have failed to cite, much deal with, the Department of Labor regulatio- that makes it clear that there is no rule that would premise joint employer status on the facts presented in this case. The regulations make it clear that, in situations such as presented here, a labor contractor may be found to be the only employer under the AWPA:

29 C.F.R. § 780.331 Crew leaders and labor contractors.

(b) The situation is different where the farmer only establishes the general manner for the work to be done. Where this is the case, the labor contractor is the employer of the workers if he makes the day-to-day decisions regarding the work and has an opportunity for profit or loss through his supervision of the crew and its output. As the employer, he has the authority to hire and fire the workers and direct them while working in the fields. Complaints by the farmer about the quality or quantity of the work or about a worker are made to the contractor or his representatives who takes whatever action he deems appropriate. His opportunity for profit or loss comes from his control over the time and manner of performance of work by his crew and his authority to determine wage rates paid to his workers.

The Court should not accept Plaintiffs' invitation to impermissibly expand the AWPA and the FLSA; their Petition should be denied.

CONCLUSION

For the foregoing reasons, Long & Scott respectfully requests that the Court deny Plaintiffs' Petition for a Writ of Certiorari.

Respectfully submitted,

CHARLES KELSO
(Counsel of Record)
FISHER & PHILLIPS
1500 Resurgens Plaza
945 East Paces Ferry Road
Atlanta, Georgia 30326-1125
(404) 231-1400

Counsel for Respondent

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